

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
IN RE: ETHICON, INC.	:	MDL No. 2:12-MD-2327
PELVIC REPAIR SYSTEM	:	
PRODUCTS LIABILITY	:	
LITIGATION	:	DATE: August 30, 2013
	:	
	x	

TRANSCRIPT OF MOTIONS HEARING HELD  
BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE  
HUNTINGTON, WV

APPEARANCES:

(All counsel appearing by telephone.)

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transcript produced by computer.

1 PROCEEDINGS had before The Honorable Cheryl A. Eifert,  
2 Magistrate Judge, United States District Court, Southern District  
3 of West Virginia, in Charleston, West Virginia, on August 30,  
4 2013, at 2:00 p.m., as follows:

5 THE COURT: Hello, everybody. So are you all ready for  
6 your long weekend?

7 MR. AYLSTOCK: Yes, Your Honor.

8 THE COURT: What do you have, about 40 depositions  
9 scheduled over the holiday? I'm glad it's you and not me.

10 Okay. Let me just mention one preliminary thing before we  
11 get started. I just -- I had -- I guess Mr. Higginbotham had  
12 contacted Laura about an extension for Ethicon to respond to the  
13 plaintiffs' motion to compel production of sales representative  
14 files and I wanted to put on the record that I have, of course,  
15 agreed to that extension.

16 So the plaintiffs -- the defendants will have until -- or  
17 wait. Is this -- I have plaintiffs have granted a one-week  
18 extension, okay. So Ethicon has now until September the 10th to  
19 file the response and then the plaintiffs would have their time  
20 after the 10th. So let's just get that on the record. Everyone  
21 agrees to that; is that correct?

22 MR. AYLSTOCK: Yes, Your Honor. This is Bryan Aylstock  
23 for the plaintiffs. They did request and we agreed to a one-week  
24 extension on their response.

25 THE COURT: All right. Super.

1           Okay. That is all I have. Who would like to go first? And  
2           I don't know if anybody wants to update me on the depositions or  
3           if you have those all resolved at this point?

4           MR. GAGE: Your Honor, this is William Gage. We do  
5           have some depo issues we need to discuss with Your Honor and,  
6           somewhat like last week, these are issues that, if we could get  
7           the Court's guidance, it will help us because they're kind of  
8           things that need to move. You know, we need to really get them  
9           into place starting next week.

10          THE COURT: Fine. Why don't you go ahead then, Mr.  
11          Gage, and tell me what the issues are.

12          MR. GAGE: Well, Judge, I've got one thing just to kind  
13          of update Your Honor and also to respond to Mr. Cartmell. He and  
14          I talked just shortly before this call.

15          Your Honor may remember, there's a big hearing with Judge  
16          Goodwin on -- I think it's September 16th. I'm sorry --

17          MR. AYLSTOCK: 18th. 18th -- or 19th, I mean.

18          MR. CARTMELL: 19th, I think. This is Tom Cartmell.

19          MR. GAGE: Okay.

20          THE COURT: Yes. There are things scheduled on the  
21          19th.

22          MR. GAGE: And we had previously agreed to take Dr.  
23          Hinoul's deposition on that day and so Tom reached out to me  
24          shortly before the call, Your Honor, and suggested that we go  
25          look at alternative dates for Dr. Hinoul's deposition and I told

1       them that I would try to report back before the call -- or, I'm  
2       sorry, at least by the call and what -- Your Honor, I just wanted  
3       to report that we will attempt to find alternative dates so that  
4       -- so that the lawyers who would otherwise be covering that  
5       deposition can be available for that hearing.

6               There is -- but there is one issue that remains with regard  
7       to Dr. Hinoul's deposition apart from maybe moving the dates and,  
8       Tom, correct me if I'm wrong, but I believe the parties had  
9       previously agreed to a two-day deposition and this, I think,  
10      would be -- Dr. Hinoul has already been deposed for two days. So  
11      this would be actually days 3 and 4 of his deposition and, in  
12      conjunction with a recent 30(b)(6) deposition notice that was  
13      issued by the plaintiffs where we are required to identify  
14      witnesses to respond to the various components of the notice, we  
15      identified, I believe it was today, that Dr. Hinoul would be --  
16      would be testifying about one of the topics in that deposition  
17      notice.

18             There are a number of topics. There are -- there are four  
19      topics and he's going to testify about one of the topics, and  
20      that topic is any reasons why a particular statement -- there's a  
21      sentence in the TVT instructions for use, but it was changed in  
22      2010 and the plaintiffs have asked for a 30(b)(6) deponent to  
23      explain why the statement was changed.

24             So we've advised plaintiffs Dr. Hinoul will be the corporate  
25      rep for that 30(b)(6) question and that we would like to wrap

1 that into the two days we are now rescheduling for Dr. Hinoul's  
2 deposition and I --

3 Tom, I don't know if that's acceptable to you, but that  
4 certainly would be our position, that we wrap that component into  
5 that two-day period.

6 MR. CARTMELL: Your Honor, this is Tom Cartmell. Yeah,  
7 that was the first I'd heard of that today. Dr. Hinoul's  
8 deposition is the conclusion of his fact witness deposition,  
9 which was originally started -- New Jersey, I think, took a  
10 period of a day or so of deposition, and then we took a day or so  
11 of deposition, and so we did not finish, and we had agreed --  
12 Christy Jones and I agreed that we would come back to finish his  
13 fact witness deposition.

14 They had also identified -- the defense had also identified  
15 Dr. Hinoul as a 30(b)(6) witness way back related to our research  
16 and development or our design, the 30(b)(6) notice. Dan Smith  
17 had several topics in that notice and Dr. Hinoul had several  
18 other topics. I think it's close to -- it's between ten and  
19 fifteen topics Dr. Hinoul has been identified to discuss. They  
20 are clinical studies related to all products; in other words, all  
21 the TVT products. So it's covering an enormous amount of ground  
22 and information.

23 All of the -- or excuse me. All of the clinical studies for  
24 each of the TVT products and all of the prototypes as well, which  
25 totals up to nine or ten products, he has been identified to

1 discuss. I agreed to do the 30(b)(6) in conjunction with that  
2 and try to get done. Frankly, I don't think there's any possible  
3 way that we're going to get done with that 30(b)(6).

4 We'll do the fact witness deposition, as we agreed. We'll  
5 get done with that. The 30(b)(6), we're only going to have, I  
6 think, probably a day or a little more than that for that. I  
7 agreed to do that and then say, hey, you know, if we don't get it  
8 done, we may be asking for another day, and so our intent was to  
9 try to finish that, although I think it's extremely unlikely.

10 Then today, they obviously identified him to discuss another  
11 topic, which Mr. Gage is right, it is one -- it is only one  
12 paragraph that, I guess, they've identified him for, but the  
13 topic is all studies and data and evidence that support a claim  
14 in their -- in their label related to how this mesh in each of  
15 the six products, or seven or eight, whatever it is, how the mesh  
16 works in a live woman's body, and I suspect there's going to be a  
17 ton of data that they are going to throw at us related to that  
18 topic.

19 So, whereas, it may be one issue and topic, it's going to be  
20 a situation where we are going to have to go through with him  
21 data that supports the statement on a ton of products and  
22 probably a ton of studies that support it. So I just don't think  
23 there's any way -- they're clearly trying to jam us up here. I  
24 don't think there's any way we can finish those together.

25 THE COURT: Well, let me make sure I understand. So

1 Dr. Hinoul has already been deposed for a couple of days and  
2 that, perhaps, was in the New Jersey litigation?

3 MR. CARTMELL: Your Honor, this is Tom again. That was  
4 in this case. We -- it was noticed up and it was cross-noticed.  
5 New Jersey's lawyer did some questioning on the Prolift, you  
6 know, the products that have been in discovery in New Jersey, and  
7 then we started on the TVT products, but we didn't finish.

8 THE COURT: Then the two days that you now have set  
9 aside, the additional two days, is that -- are those days  
10 intended to be a continuation of a Rule 30(b)(6) deposition, or  
11 are those two days of fact testimony, or is that a combination?

12 MR. CARTMELL: It's a combination of both and it's not  
13 a continuation of the 30(b)(6), Your Honor. It is a -- it's the  
14 first time we've ever had a chance to ask him questions about his  
15 designation as a 30(b)(6) witness.

16 THE COURT: But it's about the topics that you -- you  
17 started on previously; is that correct?

18 MR. CARTMELL: Well, no. We didn't start on these  
19 topics. He was identified on different topics and nobody has  
20 ever asked a question about these topics.

21 THE COURT: So there have been two separate 30(b)(6)  
22 notices of deposition to which Dr. Hinoul has been identified as  
23 a corporate designee?

24 MR. CARTMELL: That's correct, Your Honor.

25 THE COURT: Questions have been asked on some of the



1 topics; on the second notice, the questions haven't been asked  
2 yet, and that's what the two days is supposed to be, that  
3 deposition, as well as a day of fact witness testimony, correct?

4 MR. CARTMELL: Your Honor, this is Tom. I apologize  
5 I'm not clear. He has been -- you're right that he has been  
6 identified in two separate 30(b)(6) notices as their designee.  
7 We have not asked a question of him on either of the topics in  
8 either of the notices that he has been designated for.

9 THE COURT: Oh, I thought I understood you to say that  
10 you got started, but you didn't get finished.

11 MR. CARTMELL: We got started with his fact witness  
12 deposition. We did not get started with the 30(b)(6) deposition,  
13 but I agreed to go ahead and put the 30(b)(6) deposition after  
14 the completion of the fact witness deposition.

15 THE COURT: And the additional topic that he has been  
16 -- I mean you -- based on the first notice of deposition, Rule  
17 30(b)(6) deposition, you're okay? You think you can finish that  
18 in one day?

19 MR. CARTMELL: No. What I said was, and I told them  
20 this honestly, I'm willing to take your two days and finish the  
21 fact witness depositions and then start the 30(b)(6), but because  
22 he's been identified on like fifteen different topics, and  
23 there's -- the other thing to understand is he didn't even get  
24 there until 2009. So he's been identified on things. Unless  
25 he's -- I suspect he's not going to know about a lot of the

1 stuff, but I don't know that. I don't think there is any way we  
2 are going to finish that 30(b)(6), and I've told them that, but  
3 I'm willing to go forward and, if we don't, then, of course, I  
4 was -- we were going to come back and say we didn't finish that  
5 30(b)(6).

6 THE COURT: Okay. Now one additional topic, as I  
7 understand it, has to do with why language, why a sentence was  
8 changed in a document; is that correct?

9 MR. CARTMELL: This is Tom. That's not really a  
10 question -- it's not a sentence that was changed. They have had  
11 in their labeling the sentence that says, "The mesh has  
12 bidirectional elasticity that allows it to withstand the forces  
13 in a woman's body" essentially. That's what the sentence says.

14 We've asked dozens of witnesses, you know, what is the  
15 support and data for that? None of them have an answer for that  
16 and our -- except several have said there were studies done in  
17 the 70s and 80s and 90s that support that, and we say, is it  
18 hernia mesh studies that were done that provide the support for  
19 this statement that is in a TVT that goes in a woman's pelvis and  
20 they say, "Well, we don't know for sure." So we did a 30(b)(6)  
21 to nail down exactly what studies and data and evidence support  
22 the claim that the mesh has those characteristics.

23 MR. GAGE: Your Honor, if I -- this is William Gage.  
24 If I could just respond briefly, and I hate that I got things  
25 going off into the detail that it's gotten off into, but just at

1 kind of a 50,000-foot level, let me just kind of tell you how I  
2 see the issue.

3 When -- based on the prior discussions, it is my  
4 understanding that -- that we took a very hard line position and  
5 said we are giving you two more days for Dr. Hinoul and that --  
6 and that's it and -- and so, while I understand Mr. Cartmell is  
7 saying that his position is, well, we would try to finish in two  
8 days, I just wanted the record to be clear that that was not  
9 necessarily the position that we agreed with. Our position was,  
10 no, we believe two days should be sufficient. So I just wanted  
11 to clarify that for the record.

12 The second thing I wanted to state was that, Judge, the  
13 deposition notice that -- that we designated Dr. Hinoul to  
14 respond to, one of the four topics to date, was topic number two.  
15 Topic number one is the identity of all the studies and data and  
16 other evidence that formed the basis of the statement in the IFU.  
17 That's what Mr. Cartmell just told you is going to take a lot of  
18 time and lots of data and they're going to shove a lot of data on  
19 us and it's going to take forever to question, but Dr. Hinoul is  
20 not the designated deponent for number one. That's going to be  
21 Tom Barbolt.

22 Question number two comes after question number one, and  
23 question number two says, "Any and all reasons why the claim in  
24 the IFU above was changed in 2010". So it was that singular  
25 issue that we designated Dr. Hinoul today to testify and so, at

1 50,000 feet, Judge, what basically I see is the parties had  
2 agreed to two days, understanding we have a dispute as to whether  
3 two days is sufficient, and then all we did today was add one  
4 more question to that existing two days, and it was just our  
5 position that that simple addition of that one question shouldn't  
6 then be the tipping point or the straw that breaks the camel's  
7 back that then automatically opens it up to a third day of  
8 deposition and that was just really our position on that, Judge.

9 THE COURT: Well, Mr. Cartmell, it doesn't sound like  
10 that question would take that long to answer. If -- if these  
11 studies and whatnot are going to be described by some other  
12 witness, then it seems to me that it would be probably pretty  
13 simple for Dr. Hinoul to answer that -- that second question as  
14 to the reasons, which would probably be because of the findings  
15 in the studies, and somebody else is going to tell you about the  
16 studies. So I don't see why you wouldn't -- why you shouldn't be  
17 able to do that in the day that you've got set aside for the Rule  
18 30(b)(6) deposition.

19 MR. CARTMELL: Your Honor, I was -- this is Tom  
20 Cartmell. I was just going to say, I -- you know what, I had not  
21 seen that. I just got the e-mail saying number two and I'm not  
22 in my office. So I do agree with that. I didn't -- I thought he  
23 was the one designated to discuss all the clinical trials like he  
24 is in the other 30(b)(6).

25 So while I agree that it sounds like that may not take a lot

1 of time, you know, I -- again, I would like it to be clear to the  
2 Court that there are topics on the other 30(b)(6) that we have to  
3 get through; in other words, that are critical to each of these  
4 cases, and I don't think there's any way that we're going to be  
5 able to do it in a day and a half, and I'm going to -- we have  
6 decided we're going to try to finish the fact witness deposition  
7 in a half day or, you know, at that point.

8 But, you know, to get to those fifteen, ten to fifteen, and  
9 then to get to this, I'm just not sure we can do that with this  
10 witness and it's going to be really prejudicial to us if we have  
11 to -- you know, if we can't get through the other stuff. If we  
12 get through the other stuff, yeah, it doesn't sound like, I don't  
13 know, because we don't know exactly what he's going to say, but  
14 it doesn't sound like this addition is going to take much longer.

15 MR. ANDERSON: Your Honor, this is Dan Anderson. If I  
16 could add something, and that is that I took Thomas Barbolt's  
17 deposition in the first round of depositions and he was a 30(b)(6)  
18 witness on things similar to this. Part of the problem is that  
19 he is not a clinician. He is not a surgeon. He's a  
20 veterinarian.

21 And so, oftentimes, when I would ask about a study and he  
22 would talk about it, I would say -- ask him the logical follow-up  
23 question, at least it was logical to me, and that is, "And what  
24 is that effect in a woman's pelvis", because he does animal  
25 studies, and he would say, "You'd have to ask a clinician. You'd

1 have to ask a clinician" on question after question.

2 And, therefore, if he's going to push those types of things  
3 off to the clinician which, in this case, would be Pete Hinoul on  
4 that topic, then we're going to have to re-plow the ground as  
5 between what is shown in an animal versus what you would  
6 anticipate that showing and what would be a logical step as to  
7 whether or not that even is applicable after you tested it in the  
8 tissue of a rat's back, they call it "rat dorsum", and they test  
9 a small amount of tissue in the back of a rat and then,  
10 constantly, I would ask him the question, "And how does that  
11 relate to how it would react not from 30 days in a rat's back,  
12 but for the life of a woman with a large piece of mesh in and  
13 around her pelvic organs", and the answer would be, "You'll have  
14 to ask a clinician. I don't know".

15 So we could easily run into, and I anticipate that we will  
16 run into that very same situation here. So what seems like a  
17 singular question on a singular topic actually is a very big  
18 topic and they will oftentimes say, oh, we've had plenty of  
19 studies on that and our goal in these 30(b)6s is to not allow  
20 that to hang out out there.

21 Just like if anyone else was in our shoes doing their due  
22 diligence in trying to prove our burden, we have to say what  
23 studies are those and how do you -- how are you claiming to this  
24 jury and to this Court that those would react in the same manner  
25 in a woman's tissue for the rest of her life as they did in these

1 animal studies and Thomas Barbolt simply will not be able to make  
2 that connection, as evidenced by past history and past deposition  
3 testimony. That's all I have to add.

4 THE COURT: All right. Well, I think we've really gone  
5 about as far as we can on this particular issue. I think it  
6 sounds like we're going to have to wait and see. You're all  
7 concerned about something that hasn't happened yet. I think that  
8 the plaintiffs understand that they need to get these depositions  
9 done. They need to do it efficiently and as quickly as possible.

10 I'm going to suggest that they be prepared to ask Dr. Hinoul  
11 about the additional topic at this two-day deposition and if, for  
12 some reason, things get way off course and you can't get  
13 something done, then we'll have to discuss it at that time, but  
14 right now, it's all just -- it's all a lot of things that haven't  
15 happened yet. So let's move on to some -- something else.

16 What else do we have?

17 MR. AYLSTOCK: Judge, this is Bryan Aylstock. A  
18 concrete issue that I'd like to bring up on a deposition topic is  
19 Paul Parisi and Paul -- Mr. Gage and I have had numerous  
20 back-and-forths, and we have asked repeatedly, and we're just at  
21 impasse on whether the MDL gets any more time for Mr. Parisi.

22 By way of background, this was the deposition that you were  
23 called at because Mr. Slater from New Jersey took the entirety of  
24 the first day of the deposition and asked questions primarily on  
25 the Prolift product. He was following up. He's New Jersey's --

1 he's Ethicon's 30(b)(6) designee on professional education for  
2 New Jersey and so Mr. Slater asked a series of questions and  
3 finished up his Prof deposition, his Prolift deposition, and then  
4 you were called to weigh in on whether or not the redirect on  
5 that, or the direct examination, should go forward or wait, and  
6 what you ultimately said is, well, go ahead and finish the  
7 Prolift direct examination and then you can start on the TVT  
8 stuff.

9 So, ultimately, that's exactly what happened and, after a  
10 back-and-forth, we got started shortly before lunch, and then  
11 there was a lengthy lunch break, and then we got going, and  
12 ultimately, the MDL got three hours, just a little hair over  
13 three hours of deposition testimony of Paul Parisi.

14 And a little more background, and I've said this before, but  
15 just to remind the Court, Paul Parisi, as the Worldwide Director  
16 of Professional Education for -- from 2007 on, he changed jobs  
17 just recently, but worldwide, was before that, I asked, "Can you  
18 send me -- please tell me what the final Prof Ed materials are?  
19 Can you please do that for me?"

20 We asked for it in open court. Ms. Jones addressed it  
21 before Judge Goodwin and Your Honor and, ultimately, after  
22 asking, I got a grid at 10:00 the night before the deposition and  
23 that was clearly and admittedly inaccurate, incomplete, and  
24 totally, you know, useless certainly at 10:00 before the night of  
25 the deposition.



1           Three weeks later, I got an updated grid that had 50 percent  
2 more Prof Ed materials on it, an additional 17. It went from 35,  
3 I think, to 7 -- to 51, what were supposedly final Prof Ed  
4 materials. Since then, we've identified more and they've said,  
5 yeah, these are more Prof Ed materials we didn't put on the other  
6 grid.

7           So he was also -- before Worldwide Director of Professional  
8 Education, he was the product -- Product Director for  
9 Incontinence and Pelvic Floor Repair from 2003 to 2005. He's  
10 been an Ethicon employee since he got out of college. He was New  
11 Product Strategic Marketing Manager, Pipeline in 2001. He is a  
12 lifelong employee of this company and clearly a highly relevant  
13 witness on a topic that is very difficult to be concise with  
14 because these professional education materials, some of them are  
15 two-hour long videos.

16           It's not just like you can show, you know, here's a few  
17 pages of a Prof Ed material. These are videos. They're  
18 webinars. They're preceptorships. They're proctors. They're  
19 cadaver labs. There are, you know, 50-some-odd-plus materials  
20 admittedly and we've had three hours with the guy and it's  
21 Ethicon's firm position that we get no more time and we need his  
22 deposition, and we're entitled to his deposition, and it's not  
23 something that, frankly, I think I can complete in one additional  
24 day.

25           I would like to request two additional days, given the

1 importance of this witness, but at a minimum, we've been given  
2 three hours of time and what we're told by Ethicon is a pile of  
3 sand and I just don't understand it and I'd really like the Court  
4 to order him to be produced. It doesn't necessarily have to be  
5 immediately. I would like it sometime in September or October,  
6 but for two consecutive days so I can finish that deposition.

7 THE COURT: Mr. Gage, that doesn't sound unreasonable  
8 to me. Three hours is not enough time.

9 MR. BROWN: Your Honor, may -- this is Michael Brown.  
10 May I speak?

11 THE COURT: Yes.

12 MR. BROWN: I think there's a couple of things that we  
13 need to let you know, Your Honor, is that Paul Parisi was deposed  
14 in a New Jersey deposition for three days previously and there  
15 was an MDL fact deposition that took place and the -- and the MDL  
16 plaintiffs allowed the New Jersey to take the whole first day of  
17 the deposition instead of asking him about the TVT products.

18 We were present at 9:00. The plaintiffs' counsel from New  
19 Jersey wasn't available until 9:30. We then, the next morning,  
20 were available at 9:00 ready for the deposition, but MDL  
21 plaintiffs did not want to go forward with the deposition until  
22 New Jersey counsel got there. We did not start until 10:01. We  
23 took a 40-minute lunch and then, Mr. Aylstock ended the  
24 deposition at 4:05, when we were ready to continue.

25 So plaintiffs' counsel did have two days' worth of time to

1 do the deposition for this fact witness and chose to allow New  
2 Jersey to ask questions with regard to Prolift products where  
3 he'd been asked for three days and they had an opportunity to ask  
4 this fact witness about those depositions and, Your Honor, our  
5 position is that when we're going to put these witnesses forward  
6 for two days in a fact deposition based upon MDL's notice that  
7 they would ask questions about the TVT products that are at issue  
8 and, also, that if they are going to allow New Jersey to ask  
9 questions, that it would be applicable questions on these TVT  
10 products and, when our witnesses are provided, that we would  
11 begin at 9:00 when we're there, not at 9:30 on one day, and not  
12 at 10:00 on the next day, and that the deposition wouldn't be  
13 stopped at 4:00 and that the questions would continue to be  
14 asked.

15 Your Honor, so those are a couple of major issues there, and  
16 then from 2008 to 2010, he was not doing Gynecare's business. He  
17 was a marketing director. There have been multiple marketing  
18 witnesses. There have been other professional education  
19 witnesses. And the professional education, as we've discussed,  
20 primarily just looks at the logistics of bringing this  
21 information together. It's the medical affairs groups that are  
22 responsible for the actual substance and content behind it, Your  
23 Honor.

24 THE COURT: Well, with all due respect to the counsel  
25 from New Jersey, who I am not familiar with, it doesn't sound to

1 me as though anybody is able to control him or tell him what to  
2 do or allow him to do things. I think he does what he wants to  
3 do.

4 I don't think that should prejudice the plaintiffs'  
5 attorneys in this MDL. They should have an opportunity to ask  
6 questions. So I'm going to give them more time to do that.

7 I think you're going to need to work out some time frame to  
8 allow them to question Mr. Parisi because three hours just isn't  
9 enough. Now I understand you thought it should have gone longer  
10 and this and that, but the bottom line is, they haven't had  
11 enough time. I don't think what they're asking is unreasonable.  
12 So I suggest you try to figure out a time frame to continue his  
13 deposition and this time it will only be for the MDL attorneys to  
14 ask questions. If they choose -- this time around, if they  
15 choose to let the lawyer from New Jersey take control, then  
16 they're just going to be out of luck.

17 MR. AYLSTOCK: Thank you, Judge. That won't happen  
18 again, I can assure you. We were trying to --

19 COURT REPORTER: I'm sorry. Who's speaking?

20 MR. AYLSTOCK: I'm sorry. This is Bryan Aylstock. I  
21 appreciate your comments and, just so the record is clear, there  
22 was cross notice in New Jersey as part of it, but I hear what  
23 you're saying and we'll be -- and I appreciate your ruling.

24 THE COURT: All right. What's the next issue then that  
25 we can handle today?

1 MR. GAGE: Judge, the next one concerns a Dr.  
2 Aisenberg.

3 COURT REPORTER: I'm sorry. Who's speaking?

4 MR. GAGE: Oh, I'm sorry. This is William Gage.

5 The next issue concerns Dr. Aisenberg and the issue is  
6 whether he should be offered up for one day or more than one day  
7 and I will again yield the floor to Michael Brown, who knows Dr.  
8 Aisenberg better than I do, and he can address, Your Honor, our  
9 position as to why it should be a one-day depo and why we're  
10 struggling to understand why it should be more than one day.

11 MR. BROWN: Your Honor, Michael Brown. Dr. Aisenberg  
12 is a former employee who was at Ethicon from 1999 to September of  
13 2002. So he would arrive after the first product TVT was  
14 launched in 1997 and he was gone before the TVT-O product was  
15 launched and so he was a medical director for sustainment only of  
16 TVT-O for one product and, based upon that, Your Honor, we  
17 believe that there should only be one day of deposition.

18 THE COURT: All right. Who wants to respond to that  
19 from the plaintiffs' side?

20 MR. CARTMELL: Your Honor, this is Tom Cartmell. We --  
21 Dr. Aisenberg was the very first medical director at the company  
22 when they started selling mesh for use in women's pelvises. He  
23 was not involved in only one product; in other words, we have  
24 documents that show that he was involved in TVT; TVT-II, which  
25 was a change not only to the needles, but also the mesh of the

1 product in 1999; TVT-AA, which is the abdominal approach;  
2 TVT-Blue; Prolift; PROLENE Soft; the development of TVT-O, as  
3 well. It's multiple, multiple products.

4 He was the key related to the transition from MedScand which  
5 is the European company that originally manufactured the product,  
6 and then it was purchased by Johnson & Johnson. The transition  
7 to Johnson & Johnson is a critical time period in this case and  
8 what we found from multiple depositions is there are clearly  
9 boxes and boxes of documents that are missing. They're either  
10 not produced because they're lost, or they're missing, and we're  
11 getting -- we're getting different answers from different  
12 witnesses and it's become a major source -- well, a major source  
13 of questioning during the depositions and I know he's going to  
14 have more information about that essentially than anybody other  
15 than Ms. Angelini.

16 He was involved in the initial labeling of the product,  
17 which is critical because the first trial in this case is a TVT  
18 Classic case. He was the medical director that had to sign off  
19 on all the labeling. They told us that they are missing the  
20 original labels from 1998-1999 up until the end of 2000 and have  
21 been unable to explain where those labels are, although we have  
22 information that those labels did not contain information related  
23 to all practice of injuries to plaintiffs that we have, was  
24 involved in the adverse event reporting during the key time for  
25 -- actually, we -- my belief was it was '97 to 2002 when he was

1 there and adverse event reporting, the post-marketing  
2 surveillance, he signed off on all the marketing materials for  
3 all of these products.

4 And so he is, for this first trial, the marketing -- or,  
5 excuse me, the physician that they all point to. They say you  
6 have to go to Medical Affairs. They're the ones that are  
7 responsible for warning. In all of the medical aspects of our  
8 defect case, he's the most important witness that we have. There  
9 is absolutely no way we can finish his deposition in one day.

10 Again, with all these products, it's unlikely we will in two  
11 days, but we have agreed that we would do everything within our  
12 power to do it within two days. This is a date for deposition  
13 we've been trying to get for months and months and months and  
14 have just recently, in the last month or month and a half, been  
15 given a date. We thought that they may not be able to give us a  
16 date.

17 So we know that he was a consultant prior to '99 as well, is  
18 our understanding. Anyway, we really feel strongly we need more  
19 than one day. Two days, we're hopeful we can finish with this  
20 important witness.

21 THE COURT: Mr. Brown, there -- clearly, there is a  
22 very different perception as to the role that Dr. Aisenberg  
23 played. Did he play a role in more than one product? They're  
24 saying it was TVT, TVT-II, TVT-AA, PROLENE. Can you answer that  
25 for me?

1 MR. BROWN: Yes, Your Honor. I'm not familiar at all  
2 with a product called TVT-II, nor am I aware on any short form  
3 complaints that there is a product called TVT-II out there, nor  
4 is there a TVT-Blue out there, as they he have indicated,  
5 whatsoever. So I'm not sure, Your Honor.

6 You know, Your Honor, there was a TVT-Retropubic or Classic,  
7 which was the first product. It was launched in Europe in '97,  
8 and then the United States in 1998, and then you've got your TVT  
9 Opturator case, Your Honor, that comes after that.

10 They did mention a TVT-AA, which is an abdominal approach  
11 that the plaintiffs did not ask a question about to date, but,  
12 Your Honor, he -- so he was within just that three-year time  
13 frame and the labeling issue in this first case that they had  
14 mentioned is a 2010 label and has nothing to do with the labeling  
15 that would have taken place in 1997 or '98 because he wasn't  
16 present at that time.

17 MR. CARTMELL: Your Honor, this is Tom Cartmell. Those  
18 products -- again, if Mr. Brown had attended Dan Smith's  
19 deposition, he would have heard about TVT. It's come up in  
20 multiple depositions. It does exist. It was a change to the  
21 original TVT.

22 The other thing is, you know, they've told us he is one of  
23 now, I think, fourteen or fifteen witnesses that they don't have  
24 a custodial file for, but there are 42,000 documents that have  
25 his name on them. 6,000 documents -- excuse me. 42,000 pages



1 that have his name on them. It's one of the largest amounts of  
2 pages that we have. There is a total disconnect here between  
3 what we think he's involved in and what they think he's involved  
4 in.

5 THE COURT: Well, based on -- based on what I've heard,  
6 particularly the number of documents that are attributable to Dr.  
7 Aisenberg or that he appears in, I don't think one day will be  
8 enough either. I think two days should be plenty. So I'm going  
9 to allow them two days to take Dr. Aisenberg's deposition, but  
10 the two days will be it, unless something comes up at his  
11 deposition that indicates that he had much greater involvement  
12 than what Mr. Brown believes him to have had.

13 MR. CARTMELL: Thank you, Your Honor.

14 MR. BROWN: Thank you.

15 MR. GAGE: Your Honor, the final deponent that -- well,  
16 I owe -- I will say this. I owe Mr. Cartmell some time for Dan  
17 Smith and I just frankly totally forgot it. I'm just dead level  
18 honest with you and I -- and so I just want to apologize, but I  
19 have to get back with him on a date for that and so, anyway, Tom  
20 reminded me of that right before the call by e-mail and I just  
21 went, wow. I just forgot it. So I do -- I do owe him some time  
22 on that and I'll get that to him as quickly as I can, Judge, but  
23 -- but so that's not a -- I hope we don't have a dispute on that.

24 But the last issue that I think just kind of hit us square  
25 concerns a guy named Jim Mittenthal and Jim Mittenthal, Judge, is

1 the company's kind of outside guy that's been put up for these --  
2 you know, the document retention issues and I think he's been  
3 deposed once, maybe twice. I haven't been personally involved  
4 with the depositions, but let me tell you what the issue is.

5 Mr. Mittenthal was last deposed on August 13th and, after  
6 that deposition, as I understand it, a conversation was held on  
7 that day, immediately after the deposition. The plaintiffs asked  
8 for additional time with Mr. Mittenthal and they specifically  
9 wanted Mr. Mittenthal to -- the agreement was reached that the  
10 plaintiffs would give us the names of ten witnesses that -- that  
11 he would then go investigate their files and be able to respond  
12 at the next deposition as to the status of the document retention  
13 for those ten individuals. I guess it's like kind of a beta  
14 test, you know, you just look at ten.

15 So we asked the plaintiffs to identify for us -- you know,  
16 tell us who the ten are that you choose, and there have been  
17 several -- and, in the meantime, while we were waiting for the  
18 ten -- the list of the ten names, his deposition was scheduled  
19 for September 10. Now we received the names today.

20 And the problem, Judge, is that we are requesting of the  
21 plaintiffs to move the deposition from the 10th to the 17th and  
22 push it back a week for two reasons. One is, because we have  
23 just now gotten the list of the ten names, we believe it is going  
24 to take more than between now and September 10 to get the  
25 investigation done so that he can properly testify about those

1 ten witnesses;

2 And then, secondly, Mr. Mittenthal observes Rosh Hashanah  
3 next Thursday and Friday and so that kind of knocks out two days  
4 that would otherwise be available for him to conduct the  
5 investigation into those ten witnesses.

6 Now I mentioned this very briefly to Mr. Cartmell when we  
7 talked about it. This issue didn't surface, I think, until  
8 today, so it's kind of fresh, but I did mention it to Tom and Tom  
9 said, William, I'm not personally involved with Mittenthal, but  
10 he said, it's my understanding that it's the plaintiffs' desire  
11 that that deposition go on the 10th, as opposed to the 17th and,  
12 Judge, I -- I don't really -- I have not heard a reason why it is  
13 so critical it go on the 10th versus the 17th, but I'm afraid I'm  
14 setting myself up for failure because I'm going to have a witness  
15 who is not going to be adequately prepared to respond to the list  
16 of the ten names, which we just received today.

17 THE COURT: All right. Who would like to respond to  
18 that?

19 MR. AYLSTOCK: Your Honor -- this is Bryan Aylstock,  
20 Your Honor. I'll respond. Just a little background on this,  
21 Your Honor. Mr. Mittenthal was the 30(b)(6) designee of Ethicon  
22 on our document production 30(b)(6), and we've alluded to this  
23 several times, but there are dozens of custodial files that are  
24 gone, have gone missing, including all the way down from sales  
25 reps on the cases that will be coming up for trial, all the way

1 up to the president of the company, and these were files,  
2 custodial files that should have been preserved because there  
3 were litigation holds in place, and that's been admitted to, and  
4 there -- you know, so we have testimony of multiple witnesses.

5 When we looked at folks -- I deposed the Chief Science  
6 Officer, Dr. Mahmoud, and he had very -- he had less than a  
7 hundred documents in his entire file, and almost all were  
8 personnel file documents. Yet, I find other documents that  
9 happened to be in the production with his name on them. He says,  
10 "No, I saved everything. I meticulously saved everything. I  
11 would not have deleted it". So it is a major, major issue, and  
12 it is an issue that has been going on for a long time.

13 In fact, the deposition notice that this is -- that we're  
14 talking about here with Mr. Mittenthal was served back in May.  
15 It was served in May. What happened was, procedurally, we had  
16 the date. Literally, the weekend before the deposition was  
17 supposed to happen, I get an e-mail from Ms. Jones, "Please, will  
18 you move this deposition for me? It snuck up on me. I didn't  
19 realize", whatever.

20 I said, all right. I'll move it, but we need a date  
21 certain. I'll move it if you agree to produce somebody who is  
22 well -- and, you know, I need to know this, too. I want to make  
23 sure this person is prepared to address each and every topic in  
24 the notice because it's a specific -- it's a very important issue  
25 to us. I'll agree to move it. So we moved it and we moved it to

1 a date that Mr. Mittenthal was agreeable to.

2 Then, about a week before that deposition, they Prof Ed  
3 noticed Mr. Mittenthal in New Jersey notice and said, well, let's  
4 do it together, and I said, look, we're trying to coordinate.  
5 Yes, we will agree to move it again at your request because we --  
6 we think it's an important issue, but let's do it one time. That  
7 makes total -- total sense.

8 And so we get to the deposition. I attended as well and so  
9 I was -- I listened. I didn't conduct the deposition personally,  
10 but I certainly was there and heard the discussion afterward.  
11 What was said is, look, we will give you -- it wasn't even really  
12 a request. The issue of why it didn't get completed was  
13 two-fold.

14 One, there is a -- what's called a Corrective and Preventive  
15 Action Plan, a CAPA. It's an internal procedure for Ethicon, and  
16 one of the CAPAs, when they identify a problem, they open a CAPA,  
17 and this was a -- not a new issue at all. In fact, it was an  
18 issue I brought up in one of my very first depositions about two  
19 years ago, I think, in this litigation in the New Jersey  
20 deposition with Jennifer Payne, I brought it up. So it's not a  
21 new issue.

22 But if I can get to the point, the CAPA related to the  
23 failure of Ethicon to maintain control on the litigation of  
24 documents for litigation and regulatory purpose, that was part of  
25 our notice. They didn't produce the CAPA files before the

1 deposition, even though we asked and even though it was required,  
2 and so what they did was they sent a partial file to one lawyer  
3 the Friday before. So they -- and, I think, admittedly didn't  
4 have them for us when they needed to. So we couldn't ask really  
5 questions about that.

6 And then, secondly, Mr. Mittenthal had extensive notes about  
7 all of his interviews with the people at Ethicon and their lack  
8 of control or whatever for these documents or -- and did not  
9 produce those notes. So they agreed to produce the notes, they  
10 agreed to produce the CAPA, and they agreed to produce Mr.  
11 Mittenthal on the 10th of September so that we could get this  
12 issue nailed down, so that then motion practice can happen, and  
13 they -- they know that it's no secret we intend to file a Motion  
14 for Spoliation because these are key documents that are missing.

15 And what this is, in my view, is an effort to further delay  
16 this deposition that has been noticed since May and this issue  
17 about the witnesses that, you know, they want us to identify the  
18 witnesses with files that they can't find, well, that is -- they  
19 know those witnesses. They've known those witnesses since the  
20 beginning and that was also part of our notice that was served  
21 back in July.

22 So it's not like -- look, we're happy to cooperate. We  
23 don't want to surprise the guy, but this isn't really a new  
24 issue. They know the whole deposition is about all these  
25 witnesses, corporate witnesses, without custodial files.

1 THE COURT: All right. Mr. -- Mr. Aylstock, did -- did  
2 you -- did the plaintiffs give to Ethicon today a list of ten  
3 witnesses that they expect this particular deponent to  
4 investigate? Is that correct? Is that true?

5 MR. AYLSTOCK: I don't -- I don't know that. If it  
6 happened, I wasn't copied on the e-mail. I don't know.

7 THE COURT: Well, I can tell you this. You can go  
8 ahead and take your deposition on September the 10th, but you're  
9 not going to ask any questions about those ten witnesses whose  
10 names you just gave to Ethicon. So if that, in fact, occurred,  
11 you're not going to be able to ask anything about them.

12 On the other hand, your other option is to delay it to  
13 September 17th, and then you can ask about the ten names that you  
14 gave to the defendants. It otherwise makes no sense.

15 Why do you want to insist on taking his deposition on a day  
16 when he can't be ready, when you've waited and waited and waited,  
17 and this is such critical information and all you have to do is  
18 wait one more week? I mean I think those are your two options.

19 If you just gave them names today, they don't have time to  
20 do the investigation they would need to do between now and  
21 September the 10th, with a holiday -- a holiday involved and plus  
22 two Jewish holidays, days that they will be taking off. It just  
23 can't be done.

24 So what's your pleasure? Do you want to ask them questions  
25 about these ten people or not?

1 MR. AYLSTOCK: I -- Judge, my preference would be,  
2 unfortunately, to delay the deposition. Just so the record is  
3 clear, they just asked for these names. I'm not trying to hide  
4 any balls. These are names that -- they know which custodial  
5 files are missing and it's not a secret, but I accept your ruling  
6 and we'll go forward on the 17th.

7 THE COURT: All right. What's the next issue?

8 MR. CARTMELL: Can I real quick, Your Honor -- this is  
9 Tom Cartmell -- clarify something, because I know Hinoul can be  
10 put behind this, but I want to make sure on something. My  
11 request on Dr. Hinoul related to the hearing being on the 19th  
12 and it becoming sort of a big deal hearing, I know every hearing  
13 is, but this one has some new wrinkles to it that make it  
14 extremely important for both sides, was -- was a request that we  
15 push that back.

16 If, in fact -- this is for you really, William. If you were  
17 going to give me earlier dates, then I'll just go -- I will miss  
18 that hearing and I will just take the deposition on the 19th and  
19 20th, because I am not -- I cannot be available and ready for  
20 that deposition, as you know, because you have -- we have so many  
21 depositions prior to that.

22 MR. GAGE: All right. So, Your Honor, we will look for  
23 a date, as I understand that, after the current -- the currently  
24 scheduled dates to accommodate Mr. Cartmell in that regard.

25 THE COURT: Is that what you want, Mr. Cartmell,



1 something after the 19th of September?

2 MR. CARTMELL: Yes, 19th and 20th, I would appreciate  
3 it, or else, if we have to, then we'll just go forward on those  
4 dates. Thank you.

5 THE COURT: Now, was Dr. Hinoul the one that has to be  
6 in Missouri to testify?

7 MR. GAGE: Judge, I am pleased to report that that  
8 trial --

9 COURT REPORTER: I'm sorry. Who's speaking?

10 MR. GAGE: Oh, I'm sorry. This is William Gage.

11 THE COURT: Yes.

12 MR. GAGE: I am pleased to report, Judge, that that  
13 trial was continued by the judge in that case and I think the  
14 continuance occurred on Wednesday --

15 THE COURT: Okay. Well, good.

16 MR. GAGE: -- this past week. Yes. That kind of helps  
17 out.

18 THE COURT: All right. Good.

19 MR. GAGE: Judge, the last -- the last thing I wanted  
20 to mention on kind of the scheduling issues and, Judge, you know,  
21 I haven't been involved in discovery-specific issues up until the  
22 last three or four weeks with Your Honor, so sometimes my body of  
23 knowledge and my history is not as deep as you probably would  
24 expect someone who is talking on this call to have, but I would  
25 -- you know, there has been a fair amount of e-mail traffic

1 between the parties and usually it's not happy e-mail traffic  
2 about -- about the production of custodian and human resource  
3 files. Those are two different files. There's custodial files  
4 and then there are human resource files and, you know, human  
5 resource files are just like the -- you know, employment files of  
6 people.

7 THE COURT: Sure.

8 MR. GAGE: Or of the deponents. Well, the curious  
9 thing that I think I am correct on is it that the parties have  
10 operated not pursuant to a court order, but have operated  
11 pursuant to an understanding or an agreement that the custodial  
12 files -- we would endeavor to produce the custodial files 21 days  
13 in advance of the deposition, so that that gives the plaintiffs  
14 time to review the documents before they go take the depositions.

15 And then with regard to the human resource files, we have  
16 endeavored -- we kind of operate to endeavor to produce those  
17 seven days in advance of the depositions and I'm not sure if  
18 there's documentation to that effect, but I know that that's what  
19 we -- that's kind of the benchmark that we each hold ourselves  
20 to.

21 Judge, the one thing I wanted to just mention, because it's  
22 now coming up a lot in the e-mail traffic between us and Mr.  
23 Aylstock and Mr. Cartmell, is because there are so many  
24 depositions that are -- that are -- that are being scheduled in  
25 the month of September and there are still a fair number that Mr.

1 Cartmell has requested for which we still haven't yet given a  
2 date; in other words, there are more depositions being scheduled,  
3 I think we've got two -- perhaps, I think, two 30(b)(6)  
4 depositions, additional new deposition notices last night, I am  
5 concerned that I'm setting up my document production people for  
6 failure because, in some instances, I'm worried that the  
7 depositions may -- you know, because we're so -- we're trying to  
8 be accommodative on the dates, I sometimes agree to dates or  
9 offer dates and I don't even think about the 21-day deadline for  
10 the custodial productions and I'm just asking for the plaintiffs'  
11 indulgence and Your Honor's patience with us. I'm predicting  
12 that we may breach the agreement between the parties on a few  
13 instances, but I just ask in advance for some consideration on  
14 that.

15 MR. CARTMELL: Your Honor?

16 THE COURT: Yes?

17 MR. CARTMELL: Your Honor, this is Tom Cartmell. I was  
18 going to respond. We have been having considerable problems. I  
19 do believe that there's only two witnesses that we have requested  
20 out, that the requests are out for right now, that are new. All  
21 of these depositions that we have requested, essentially that we  
22 don't have dates on yet, have been requested for months and  
23 months and months.

24 I mean I will say that, you know, they have had this list.  
25 What they asked us to do, and it was primarily pursuant to your

1 advice, Your Honor, was to get them a priority list of  
2 depositions and so, hearing you loud and clear, we did that. I  
3 gave them an e-mail saying these are the ones we would like  
4 before the expert deadlines. We can push all of these back, but  
5 all of those that were pushed back, other than truly only a few,  
6 they have had those names for months and months.

7 THE COURT: Mr. Gage, when you're getting -- when  
8 you've gotten the list of prospective witnesses from the  
9 plaintiffs, are you having your production people begin  
10 collecting the documents at that point instead of waiting until  
11 there's actually been a request for a definite date for a  
12 particular witness?

13 MR. GAGE: Yes, Your Honor. I think -- I think the way  
14 the process works is we actually send -- we put a list together  
15 of all the deposition requests and then we send that to the  
16 documents people so they know to start pulling those files.

17 THE COURT: Well, it sounds, from what Mr. Cartmell is  
18 saying, this list was given to you back months ago. So why  
19 wouldn't you be able to have those custodial files and HR files  
20 already available to you?

21 MR. GAGE: Well, Judge, maybe my concern is premature.  
22 I think my concern comes out of the following. There is just  
23 such an enormous amount of e-mail traffic going back and forth on  
24 depo scheduling and -- and I know I've seen one or two or three  
25 new witnesses pop up over the last few weeks that I just get

1 worried and maybe there's -- maybe I'm worried about something  
2 that's not really going to be a problem, but I just wanted to let  
3 everybody know, you know, we're doing our best on these custodial  
4 and document -- and the HR productions and it -- and it grieves  
5 me to see. We've done it in a few instances, Judge. We've not  
6 met -- sometimes we've gotten inside the 21 and the 14 days and  
7 with just all that's going on, I'm fearful that I'm going to do  
8 it, that it's going to happen again, and I just want Your Honor  
9 and the parties to know we -- we are doing our best to make sure  
10 that that doesn't become a problem and that's really all I wanted  
11 to say, Judge.

12 We are pulling the ones from the lists that we've had for  
13 quite awhile. I'm less concerned about those than I am about  
14 maybe some of the more newer ones.

15 THE COURT: Well, and I think what will be considered a  
16 reasonable effort on your part will depend a lot upon when you  
17 were first asked about that witness and how many documents are  
18 attributable or in the custodial file of that particular witness.  
19 So I don't -- I understand that you're trying and I think that's,  
20 you know, what you need to do.

21 I guess if some issue comes up in the future, we'll have to  
22 look at that individual witness and when you were first requested  
23 to present that witness and what sort of efforts were made to  
24 collect the file and how big the files are.

25 So, you know, I think -- I think we don't need to worry

1 about that probably today. It doesn't sound like there's  
2 anything coming up that you are aware of sitting here today where  
3 you're not going to have the file to them in a reasonable amount  
4 of time.

5 MR. GAGE: That's correct, Your Honor. As I sit here,  
6 I don't think we're aware of any problems where we know we're  
7 going to have a problem.

8 THE COURT: Okay. Well, that's -- you know, if  
9 something comes up, we can address it at the time. I think, as  
10 long as you're turning the names over to whoever it is that  
11 collects the documents, as long as you're turning those names  
12 over shortly after you receive them, then I don't -- you know, I  
13 don't know what else you can do, really.

14 MR. AYLSTOCK: Judge, this is Bryan Aylstock. Can I  
15 weigh in briefly?

16 THE COURT: Sure.

17 MR. AYLSTOCK: I've actually had some discussion on  
18 this because it came up at Mittenthal because, following his  
19 deposition, what one of the lawyers for Ethicon said is, "Well,  
20 we didn't realize that the CAPA files were high priority", or  
21 something like that, and I asked following that, "Well, I didn't  
22 know that you didn't think that they were high priority.  
23 Certainly, I did, but can you give us, please, the production  
24 schedule? Tell us who you're working on, which files are  
25 complete, which files are not complete? Can you share that

1 information with us, because we might have a very different view  
2 from you about what's important and what's not important". We  
3 probably do, being plaintiffs' lawyers and they're defense  
4 lawyers.

5 And it's really brought to a head with the situation with  
6 Mr. Trzewik. He was subject, as you may recall, a couple of  
7 hearings ago, and we didn't have his file and we were within the  
8 21 days. Frankly, I don't recall the 21-day agreement. I don't  
9 quarrel with Mr. Gage because I believe that a lot of these  
10 documents are clearly relevant and within the RFP requests and  
11 what I was told is that we're producing those. We've produced  
12 those. We're holding nothing back.

13 Well, Mr. Trzewik's file came in after we had raised it and,  
14 in looking at that, it's clear that a vast -- or there are dozens  
15 and dozens and hundreds of examples where documents from that  
16 file are really custodial productions for another file that are  
17 not in those files. For example, Dan Smith, who you know a lot  
18 about, or Joerg Holste. There are very critical documents, and  
19 Mr. Holste's deposition has already been taken.

20 And so now I'm -- I've lost confidence in the ability to  
21 know, first of all, what's been produced when and whether these  
22 productions are ever complete and so if they can share, here's  
23 the ones, the custodians we know that are complete, and certify  
24 that, and here's the ones that are in process and here's the  
25 central sources that are in process, then I think we can all be

1 playing from the same sheet of music, instead of wondering what's  
2 there because, frankly, we may now need to go back and say we  
3 need more time with Joerg Holste again. It's a waste of  
4 resources to do it again, but I don't know that we have any other  
5 choice.

6 MR. GAGE: Your Honor, I have a -- I have a response to  
7 that. I sent an e-mail. I -- like Mr. Aylstock, I share his  
8 views almost precisely on this issue in the sense that I think it  
9 is time for us to have a face-to-face meeting where we can talk  
10 about a number of issues with regard to documents and, Your  
11 Honor, including prioritization of what it is that's important to  
12 the plaintiffs and so I sent an e-mail to Bryan on Wednesday and  
13 asked him to let us know when we can come down to his place in  
14 Pensacola and have that face-to-face meeting because I think -- I  
15 think trying to do it over the phone just doesn't work. I think  
16 a face-to-face would be helpful.

17 And Your Honor may recall, you had asked -- you had ordered  
18 up the parties to meet and confer about some of these RFP's and  
19 so the plan is, and we're waiting to hear back from Mr. Aylstock  
20 on this, but the plan is, when he gives us a date for a  
21 face-to-face meet and confer, we're going to meet and confer on  
22 the RFP's that you've ordered us to do and then, also, on other  
23 document issues, including the scheduling -- the prioritization  
24 issue.

25 THE COURT: Yes. I think that's a great idea. I also



1 -- I like Mr. Aylstock's idea about there being a more frequent  
2 communication with them as to where you are in document  
3 collection because I think a lot of the distrust issues arise  
4 from the fact that they send out a name and it goes out into  
5 space and then they don't know what's going on with it. They're  
6 trying to schedule depositions, but they don't have the documents  
7 and they're trying to juggle these things.

8 You know you have the information that they don't have,  
9 which is, has the request been made to the document collectors?  
10 Have they started to collect it? How far are they? What else is  
11 out there? How much longer do they think it's going to take?

12 And I think it would be very helpful to resolving a lot of  
13 these issues if, Mr. Gage, you would share that information with  
14 Mr. Aylstock to say, well, yes, we've made the requests. Yes,  
15 they've started to collect. It looks like they're half done. We  
16 still have to do this portion of document review and so that --  
17 so that they have some idea of where you are with these things.

18 MR. GAGE: I agree, Judge. I think it's a great idea  
19 and, hopefully, we can structure it -- and I think Bryan would  
20 love to find a way to do this. We can structure it so that,  
21 frankly, maybe the -- you know, the lawyers on this call aren't  
22 the ones having to do that; in other words, we can maybe have  
23 some dedicated individuals in the various firms having those  
24 communications so that we're able to, you know, keep the ball --  
25 keep the eye on the other balls that we've got in the air. I

1 mean, I think it may even be good to kind of almost make a little  
2 protocol out of it.

3 THE COURT: That's a great idea. I think going to the  
4 source is going to be where you get the best information and, by  
5 the time you have somebody at another office tell somebody at  
6 your office to tell you --

7 MR. GAGE: Exactly. Exactly.

8 THE COURT: Yes. I think that's a very good idea, too,  
9 Mr. Gage. I think you all should talk about that and come up  
10 with some sort of procedure and then identify the people that are  
11 going to keep everyone updated on how the document production is  
12 coming.

13 MR. GAGE: Well, Judge, that's a good idea and I would  
14 recommend that we -- that, you know, as soon as we hear back from  
15 Bryan on the dates of the meet and confer, you know, let's get  
16 that scheduled and let's get an agenda for that meeting. I think  
17 -- I think that that would be good for us to put an agenda  
18 together for that meeting, which includes this issue.

19 MR. AYLSTOCK: And it may need to be over the phone.  
20 This is Bryan, I'm sorry. It may need to be over the phone,  
21 given our schedules but, you know, if I could get that list in  
22 advance of the meeting, it would certainly be more productive.

23 I know we're at our hour. A couple of just quick things  
24 because I don't want the record to be unclear.

25 On the custodial file production, I believe it was a 30-day

1 agreement, as opposed to a 21-day agreement, just so the record  
2 isn't -- I can't guarantee that, but I believe that was what it  
3 was.

4 And then the other thing, and this could potentially go to  
5 next week because I know we're out of time. We'd like, and we  
6 brought this up at the very end, unfortunately, at the last one,  
7 the Court to consider perhaps for some of these depositions, or  
8 all of them, at least initially, a special master that could help  
9 us wade through the responsiveness, or lack of responsiveness of  
10 these witnesses, because there are just dozens and dozens of  
11 examples we can show, but I think it would help both sides.

12 You know, and frankly, there's been complaints here and  
13 there, hey, one of our lawyers gets a little too excited or  
14 something, but if we had a special master to be able to sit  
15 through some of them and -- they've been appointed in Pinnacle.  
16 They've been appointed in the Actos MDL and so, you know, I just  
17 wanted to put that on the table. We're happy to brief it, if the  
18 Court should so desire, but that's the other thing that we really  
19 wanted to bring up today.

20 THE COURT: Well, let's think about that. I -- I have  
21 a feeling that that proposal is not going to be well received in  
22 this Court, in this district, but certainly, that's something we  
23 can -- we can talk about.

24 I think one of the things that I would want to know is how  
25 would we select a special master, and who would pay the special

1 master, and would this special master have to attend all of your  
2 depositions or are you just talking about perhaps selecting a few  
3 until you get an idea of how the special master would rule on  
4 these certain issues.

5 You know, I've never done the kind of work that you've done.  
6 I've done litigation on a much smaller scale, but I can't  
7 remember anytime in my 27-year litigation career having to have a  
8 special master sit in at a deposition to tell a witness to answer  
9 a question. That is something the witness's lawyer ought to be  
10 doing, whoever is there for that witness.

11 If the witness is non-responsive, that witness's lawyer  
12 should take them out into the hallway and say, "You have got to  
13 answer the questions". That's the job of the lawyer whose  
14 witness that is.

15 So I don't understand the concept really of needing a  
16 special master for that particular purpose, but I'm open to  
17 hearing what you say and, you know, I haven't seen any of these  
18 deposition transcripts. Maybe these are all really horrendous  
19 witnesses that won't answer a single question, but I would think  
20 with lawyers of your caliber and your years of experience, this  
21 would be something you could fix on your own without having to  
22 have another person sitting there in a deposition telling people  
23 how to answer questions. It seems a little insane to me.

24 MR. GAGE: Your Honor --

25 MR. AYLSTOCK: I agree, but this is a little different

1 in that none of these witnesses, or at least we don't believe any  
2 of them are within the subpoena power of the Court. If these  
3 were truly discovery depositions where we -- you know, and then  
4 we could bring them live and either they would answer the  
5 question or Judge Goodwin or yourself or the jury would see the  
6 ridiculousness of some of the responses, that would be one thing,  
7 but given that four days or six days, or however long we're going  
8 to have to present our case, this filibuster is just out of  
9 control.

10 MR. GAGE: Your Honor?

11 THE COURT: Yes?

12 MR. GAGE: This is William Gage. If I may respond to  
13 that. When Mr. Cartmell raised this issue with me a week or so  
14 ago on the phone and I went back and looked at some -- some stuff  
15 that he had, some transcript -- or a transcript that he wanted me  
16 to look at, and I looked at it and, Judge, I'm not going to come  
17 in here and tell you I'm batting a hundred percent with every  
18 witness doing exactly what they ought to do.

19 So when I saw that, I went -- I was provided with Your  
20 Honor's prior instructions on how witnesses should handle, you  
21 know, responses, how they should be responsive. Sometimes they  
22 get concerned. They don't fully understand this yes/no stuff and  
23 -- but Your Honor had laid out some pretty clear instructions in  
24 a prior -- I wouldn't call it -- I mean it was a ruling of the  
25 Court, yes, but I think maybe you had been asked to provide some

1 guidance to a witness on the record.

2 So I took that and I have sent that back out to my entire  
3 team and it said this is, you know, Judge Eifert's instructions  
4 on these issues. It is my hope -- and I was pretty clear on it.  
5 I mean I didn't just attach the attachment. I -- I let people  
6 know what is expected of them.

7 So I am hopeful that to the extent these issues come up in  
8 the future, I'm going to be looking to my team of lawyers to --  
9 to prepare the witnesses and work with the witnesses in  
10 accordance with Your Honor's prior statements on at least this --  
11 you know, the concept of how to handle a yes/no question and that  
12 sort of thing.

13 THE COURT: That would be much appreciated because I  
14 know that Judge Goodwin has a real problem with witnesses that  
15 won't -- that are not responsive to the question asked. If these  
16 depositions are going to be used at trial, he's going to be  
17 concerned, I think, if he hears a lot of rambling from these  
18 witnesses.

19 Plus, that doesn't do anybody any good. I mean you're  
20 trying to get the information discovered and get it done so you  
21 can go to trial, but I do believe that if these are your  
22 witnesses, Mr. Gage, which it sounds like they are, then it's  
23 your responsibility to make sure that they're answering questions  
24 in an appropriate fashion. It shouldn't require a judge or a  
25 special master to be there. It's the lawyer's job to do that.

1 MR. GAGE: Well, okay.

2 THE COURT: So I appreciate you trying to do that and,  
3 hopefully, we won't continue to have problems, if there are, in  
4 fact, problems. I really haven't seen any of the transcripts to  
5 know if there's serious problems or not.

6 I mean, you know, on the flip side, witnesses are sometimes  
7 going to ramble a little bit and that -- that can't be helped  
8 because they're nervous and they're under a lot of stress and you  
9 have to give them a little bit of leeway, but if you've got --  
10 and we've all had that witness that just rambles on and on and  
11 on. It's the lawyer's job to prevent that from happening.

12 So I'm glad to hear we're all on the same page with that and  
13 I'll let you guys work on this a little bit and, if it's not  
14 getting any better, then we can re-visit this special master  
15 concept, but --

16 MR. CARTMELL: Your Honor?

17 THE COURT: Yes?

18 MR. CARTMELL: Tom Cartmell. And your ruling has  
19 been, as I told you before, I think, cited multiple, multiple  
20 times at all these depositions, and I am just concerned because  
21 when it is cited, the belief by the attorney is that if they  
22 answer yes, for instance, to a question like, "Did your company  
23 do a" -- you know, or, "No, did your company do a study on that  
24 in live human beings", that they can then say, "The FDA doesn't  
25 require us to and we did a study in cadavers and in people and

1       blah, blah, blah, blah, blah, blah, blah".

2               And that is the interpretation of your ruling I'm concerned  
3       that they have, and that is that, as long as they say yes or no,  
4       they can then say whatever they want and the problem is,  
5       obviously, that just runs out the clock on us like crazy and then  
6       we have to move to strike it and not be concerned that the judge  
7       at the time of trial may not think that actually striking  
8       questions is a true rule, federal rule. So that -- that's my  
9       concern.

10              THE COURT: Well, and yes, and I think we've talked  
11       about this before. My ruling was that they have to answer the  
12       question. They are then allowed to explain their answer, if they  
13       need to, if they need to explain it, but the explanation still  
14       needs to be responsive to the original question.

15              Saying yes does not give them the leeway to then talk about  
16       anything else they want to talk about that might somehow be  
17       tangentially connected to the original question. I mean they --  
18       they have a right to explain their answer, if it needs to be  
19       explained, but that's -- I agree with you, Mr. Cartmell. That's  
20       not an open door for them to just say whatever they want to say  
21       about any issue in the case and I think everybody understands  
22       that. I would assume every lawyer understands that.

23              So I think we're going -- Mr. Gage has told all of us he's  
24       making an effort to educate his witnesses and his team of  
25       lawyers. So I think we're going to have to put some faith in him



1 and hope that, if this is a problem, that it won't be a problem  
2 in the future. If it continues as a problem, then we'll  
3 re-address it.

4 MR. GAGE: And, Your Honor, I'm going to ask -- I'm  
5 going to take this transcript and make sure that this portion of  
6 it is delivered to every lawyer on our team taking depositions.

7 THE COURT: Great. All right. I think we've gotten a  
8 lot done again today.

9 MR. GAGE: We have.

10 MR. AYLSTOCK: We have.

11 MR. CARTMELL: We have.

12 THE COURT: So I wish you all a nice holiday weekend.  
13 I hope you do have an opportunity to take a little bit of time  
14 off because I know you've been working at a frenetic pace. So  
15 good luck over the weekend. Take a little time off and I'll talk  
16 to you all, I guess, next Friday.

17 MR. CARTMELL: Thank you, Judge.

18 MR. GAGE: Thank you, Your Honor.

19 MR. AYLSTOCK: Thank you, Your Honor.

20 (Proceedings concluded at 3:15 p.m., August 30, 2013.)

21  
22 CERTIFICATION:

23 I, Ayme A. Cochran, Official Court Reporter, certify that  
24 the foregoing is a correct transcript from the record of  
25 proceedings in the matter of In Re: Ethicon, Inc. Pelvic Repair

1 System Products Liability Litigation, Case No. 2:12-md-2327, as  
2 reported on August 30, 2013.

3  
4 s/Ayme A. Cochran, RPR, CRR

September 5, 2013

5 Ayme A. Cochran, RPR, CRR

DATE